

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**R.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Atlantic City, NJ, Employer**

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**Docket No. 17-0131  
Issued: April 3, 2017**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 27, 2016 appellant, through counsel, filed a timely appeal from a June 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue on appeal is whether appellant met his burden of proof to establish more than 45 percent permanent impairment of the right fifth finger, for which he previously received a schedule award.

## **FACTUAL HISTORY**

On January 6, 2014 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 2, 2014 he had a vehicle door closed on his right hand causing a contusion of the right fifth finger. He did not initially stop work.

Initial medical reports documented a displaced fracture of the right fifth metacarpal bone. OWCP accepted the claim for closed fracture of the right metacarpal bone.

On January 16, 2014 Dr. Victor Frankel, a Board-certified orthopedist, performed an authorized open reduction and internal fixation of the right fifth metacarpal. He diagnosed displaced fracture of the right fifth metacarpal neck. In a March 27, 2014 report, Dr. Frankel indicated that appellant had completed physical therapy. He advised that appellant had essentially full range of motion (ROM) of the metacarpophalangeal (MCP) joints and interphalangeal (IP) joints. Dr. Frankel noted that appellant had tolerated his light-duty activities and would be released to full duty without restrictions. He discharged appellant from his care.

On April 2, 2015 appellant filed a claim for a schedule award (Form CA-7). He submitted a January 8, 2015 report from Dr. Nicholas Diamond, an osteopath. Dr. Diamond advised that maximum medical improvement (MMI) was reached on January 2, 2014. He provided upper extremity physical examination findings. Dr. Diamond diagnosed status post crush injury to the right hand, post-traumatic right little finger metacarpal displaced oblique extra-articular fracture with significant dorsal angular apex deformity and foreshortening of the metacarpal neck area, status post January 16, 2014 open reduction internal fixation of right little finger, and right little finger MCP joint and proximal interphalangeal (PIP) joint arthrofibrosis. Semmes-Weinstein Monofilament Testing “reveals diminished sensibility at 3.61 MGS over the hypothenar area of the dorsum of the right hand,” grip strength testing performed *via* Jamar Hand Dynamometer at Level III performed 5 times revealed 32.5 kilograms (kg) of force strength in the right hand versus 47.25 kg of force strength in the left hand, and pinch key testing performed five times revealed 5 kg in the right hand versus 9 kg in the left hand. Dr. Diamond evaluated appellant’s impairment in accordance with Table 15-31 page 470 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>3</sup> (A.M.A., *Guides*). Using the ROM method of evaluating permanent impairment he measured the ROM of the right fifth digit three times and found 80 degrees extension-flexion of the metacarpal phalangeal (MP) for six percent digit impairment, extension-flexion of 70 degrees of the PIP joint for 21 percent digit impairment, and extension-flexion of 25 degrees of the DIP joint for 25 percent digit impairment. Dr. Diamond noted that all ROM were carried through with pain at the extremes. He advised

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

that the combined index finger impairment was 45 percent of the digit or four percent of the right arm.

In a report dated April 17, 2015, Dr. Frankel, the surgeon, reviewed the January 8, 2015 report of Dr. Diamond and concurred with his findings that appellant had four percent impairment to his right upper extremity.

On November 12, 2015 OWCP's medical adviser reviewed the record, including Dr. Diamond's report. He noted that OWCP had accepted a closed fracture of a metacarpal bone in the right hand and that on January 16, 2014 an open reduction, internal fixation of the right fifth metacarpal bone was performed. The medical adviser noted that the January 8, 2015 schedule award evaluation by Dr. Diamond for the right upper extremity rendered four percent impairment of the right arm. He noted that Dr. Diamond had used the ROM method, using the A.M.A., *Guides*, and found ROM for the MP joint was 80 degrees for 6 percent impairment of the digit, ROM for the PIP joint was 70 degrees for 21 percent impairment of the digit, and ROM for the DIP joint was 25 degrees for 25 percent impairment. The medical adviser calculated 45 percent impairment of the digit or four percent impairment of the right upper extremity using the conversion table.<sup>4</sup> He concurred with Dr. Diamond that appellant had four percent right upper extremity impairment. The medical adviser noted that the date of MMI was the date of Dr. Diamond's evaluation, January 8, 2015.

By decision dated January 11, 2016, OWCP granted appellant a schedule award for 45 percent impairment of the right fifth finger. The period of the award was from January 8 to February 24, 2015 for 6.75 weeks of compensation.

On January 18, 2016 appellant, through counsel, requested an oral hearing which was held on April 11, 2016. At the hearing, he indicated that appellant was entitled to four percent impairment of the right arm for 12.48 weeks of compensation. Counsel asserted that appellant's work-related fracture caused impairment to his hand and arm. He noted appellant's continuing symptoms and asserted that Dr. Diamond's January 8, 2015 report supported impairment of the right hand and arm. Counsel reiterated Dr. Diamond's examination findings pertaining to diminished sensibility as well as right hand weakness.

Appellant submitted an April 4, 2016 report from Dr. Diamond who reviewed his previously January 8, 2015 report as well as the medical adviser's report dated November 12, 2015. Dr. Diamond noted the impairment rating for the right fifth digit according to the ROM deficit as outlined in his report was 45 percent impairment of the digit. Using Table 15-12, page 422 of the A.M.A., *Guides*, the impairment rating was converted to five percent right hand impairment or a final right arm impairment of four percent impairment.

Also submitted was an undated statement from appellant who noted that, as a result of the work injury of January 2, 2014 and resulting surgery, he has difficulty writing, cleaning, exercising, holding a toothbrush, and lifting a cup. He noted constant pain which affected his daily job, home and recreational duties, constant numbness which made it hard to hold a pen, and

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<sup>4</sup> *Id.* at 421, Table 15-12.

lack of motion of the right hand and finger. Appellant indicated that he was unable to play sports as he cannot grip a golf club, bat or ball, or lift weights.

By decision dated June 30, 2016, OWCP's hearing representative affirmed the decision dated January 11, 2016, finding that appellant had failed to establish more than 45 percent impairment of the right fifth finger.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>5</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>6</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>7</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>8</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>9</sup>

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<sup>5</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>6</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>7</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>8</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>9</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

## ANALYSIS

The issue on appeal is whether appellant met his burden of proof to establish more than 45 percent permanent impairment of the right fifth finger, for which he previously received a schedule award.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>10</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>11</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>12</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 30, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

## CONCLUSION

The Board finds this case not in posture for decision.

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<sup>10</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>11</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>12</sup> *Supra* note 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 30, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 3, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board